SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1010

DALE H. DREWS, ET AL.,
Appellants,

v.

STATE OF MARYLAND,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

JURISDICTIONAL STATEMENT

FRANCIS D. MURNAGHAN, JR.,
PAUL S. SARBANES,
1400 Mercantile Trust Building,
Baltimore, Maryland 21202
Attorneys for Appellants.

The Daily Record Co., Baltimore, Md. 21203

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DALE H. DREWS, ET AL.,
Appellants,

v.

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ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

JURISDICTIONAL STATEMENT

Appellants appeal from the decision of the Court of Appeals of Maryland entered on October 22, 1964, reinstating and reaffirming judgments of the Circuit Court for Baltimore County, Maryland, which had previously been affirmed by the Court of Appeals of Maryland on January 18, 1961 and vacated by the Supreme Court of the United States on June 22, 1964, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial federal question is presented.

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland setting forth the decision and judgment from which this appeal is

taken and the dissenting opinion of Judge Oppenheimer are reported in 236 Md. 349, 204 A. 2d 64, and are attached hereto as Appendix A. The earlier opinion of the Court of Appeals of Maryland which was reviewed by the Supreme Court of the United States (378 U.S. 547) is reported in 224 Md. 186, 167 A. 2d 341, and is attached hereto as Appendix B. The memorandum opinion of the Circuit Court for Baltimore County, Maryland, setting out the judgments of conviction now on appeal is unreported and is attached hereto as Appendix C.

JURISDICTION

1. This prosecution was begun by the filing of a criminal information by the State's Attorney for Baltimore County, Maryland, against the appellants under Section 123 of Article 27 of the Annotated Code of Maryland (1957 edition). Appellants were convicted of the charge of acting in a disorderly manner to the disturbance of the public peace on May 6, 1960 by the Circuit Court for Baltimore County, Maryland. The decision of the Court of Appeals of Maryland affirming the convictions was filed on January 18, 1961; that judgment was subsequently vacated by the Supreme Court of the United States on June 22, 1964 and the case remanded to the Court of Appeals of Maryland for consideration in light of *Griffin v. Maryland*, 378 U.S. 130, and *Bell v. Maryland*, 378 U.S. 226. The decision of the Court of Appeals of Maryland reinstating and reaffirming the judgment previously entered by it was filed on October 22, 1964. Notice of appeal in this case was filed on January 20, 1965 in the Circuit Court for Baltimore County, Maryland, to which the record in the case had been returned after the entry of judgment by the Court of Appeals of Maryland.

2. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred

by Title 28, United States Code, Section 1257(2). Appellants question the validity of Section 123 of Article 27 of the Annotated Code of Maryland (1957 edition) as interpreted by the Court of Appeals of Maryland in its decisions of January 18, 1961 and October 22, 1964, on the ground that, as so interpreted, it is repugnant to the Constitution and laws of the United States, and the decision of the highest court of the State was in favor of its validity as so interpreted. The following cases sustain the jurisdiction of the Supreme Court of the United States to review the decision of the Court of Appeals of Maryland on direct appeal. *Drews v. Maryland*, 378 U.S. 547 (1964); *Frank v. Maryland*, 359 U.S. 360 (1959); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *McCollum v. Board of Education*, 333 U.S. 203 (1948).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of Amendments I and XIV to the Constitution of the United States, Section 123 of Article 27 of the Annotated Code of Maryland (1957 edition), and Title II of the Federal Civil Rights Act of 1964, 78 Stat. 241, are set forth in Appendix D hereto.

QUESTIONS PRESENTED

Appellants, two white males, one white female and one Negro female, were convicted of violating a statute making it a criminal offense to act in a disorderly manner to the disturbance of the public peace at any place of public resort or amusement. The basis for the convictions was the refusal of the appellants to leave a public amusement park, owned by a private corporation. The Negro appellant and another Negro were asked to leave the park because the owner had a policy of not admitting Negroes. The white persons were requested to leave because they were

in the same group as the two Negroes. The appellants at all times acted in a courteous and peaceful manner, and their only conduct which was found to be disorderly was their refusal to leave the amusement park when requested. Under these circumstances were the appellants:

1. Denied their rights under the privileges and immunities, equal protection and due process clauses of the Fourteenth Amendment of the Constitution of the United States in that they were arrested and convicted, upon the request of a private owner, under a statute which was interpreted by the highest court of the State to make a criminal offense the refusal to leave a place of public resort and amusement when the request to leave was based solely on the ground that the presence of the appellants conflicted with the owner's policy that members of the Negro race should be excluded;

2. Denied their rights under the due process clause of the Fourteenth Amendment in that they were arrested and convicted for exercising their rights to freedom of expression and association;

3. Denied their rights under the equal protection and due process clauses of the Fourteenth Amendment in that they were arrested and convicted without any evidence that the appellants acted in a disorderly manner to the disturbance of the public peace;

4. Denied their rights under the equal protection clause of the Fourteenth Amendment in that they were arrested and convicted of acting in a disorderly manner to the disturbance of the public peace although the evidence clearly showed that others were the only persons acting in a disorderly manner and such other persons were not proceeded against by the State;

5. Denied their rights under the equal protection and due process clauses of the Fourteenth Amendment in that they have been convicted for acts arising out of sit-in demonstrations at a place of public resort or amusement, whereas the State's Attorney of Baltimore County is proceeding to discontinue and dismiss the prosecutions in approximately 200 other cases arising out of such demonstrations at the same place of public resort or amusement;

6. Exercising rights now established, protected and confirmed by the Federal Civil Rights Act of 1964, 78 Stat. 241, thereby requiring the abatement of the pending convictions and dismissal of the prosecutions of appellants.

STATEMENT OF THE CASE

On Sunday, September 6, 1959, the appellants, three whites and one Negro, together with another Negro, went to Gwynn Oak Park, a public amusement park in Baltimore County, Maryland owned by a private corporation. All Nations Day was being celebrated at the park on that particular day (R. 33-34, E. 15).[1] About 3:00 P.M. the five individuals were standing approximately in the center of the park. They were in a group by themselves and had attracted no attention from others present on the park premises (R. 34, 36, E. 15, 17). A private park guard approached them and told them that the park was closed to colored persons and that they would have to leave (R. 19, 35, E. 7, 16). There was no evidence that appellants had prior knowledge of such an exclusionary policy (See p. 14a, Appendix C). The initial direction to leave was given to the two Negroes. When they remained, all five persons were asked to leave, but they refused (R. 22, E. 9). Appel-

[1] "R." references are to the transcript of testimony at the trial. "E." references are to the Record Extract printed as part of appellants' brief in the Court of Appeals in the initial appeal.

lants were very polite to the guard; one stated that he was enjoying himself and was going to stay and look around a little bit more (R. 22-23, E. 8, 9). Although the park was crowded (R. 48, E. 23), there was no particular congregation around the appellants until they were approached and asked to leave by the park guard (R. 33-36, E. 15-17).

Upon the refusal of the appellants to leave the park, the guard summoned the Baltimore County police (R. 23, E. 8). After requesting the appellants to leave (R. 35, 40-42, E. 16, 19, 20), the police arrested the appellants on the specific request of a park official (R. 43, 49-50, E. 20, 24). The park official ordered the arrest in furtherance of the amusement park's policy of excluding Negroes (R. 19-22, 49-51, E. 7, 8, 24). During the period between the time the appellants were first requested to leave by the park police and their arrest by the County police, a crowd gathered around the appellants and the police, and its members appeared to become angry and engaged in certain unruly and disorderly activities, including spitting at and kicking the appellants and using improper language in speaking to them (R. 23-24, 26, 28, E. 9, 11, 12). There was no attempt by the park officials or by the County police to exclude from the park or to arrest any of those who engaged in the disorderly conduct (R. 37, 51, 67, E. 17, 24, 33).

When arrested, appellants locked arms (R. 43, E. 20). Appellants Drews and Sheehan, in a further show of passive resistance, proceeded to lie on the ground at which time the joining of arms with the other two appellants ceased (R. 38, 45, 51, 54, E. 17, 21, 22, 26). Appellants Joyner and Brown left the park in the custody of the police but under their own power (R. 46, 53, E. 22, 26). The others were carried out (R. 38, E. 18). None of the appellants offered positive resistance and they made no remarks other than a plea by Drews for forgiveness of someone who was

mistreating him (R. 26, 29, 47, 61, 63, E. 11, 13, 22, 30, 31). The appellants were then taken to a police station where an employee of the park swore out a warrant against them.

On April 5, 1960, the appellants were charged in an amended criminal information with "acting in a disorderly manner, to the disturbance of the public peace, in or on Gwynn Oak Amusement Park, Inc., a body corporate, a place of public resort and amusement in Baltimore County" contrary to Section 123 of Article 27 of the Annotated Code of Maryland (1957 edition). On April 8, 1960, appellants were arraigned, pleaded not guilty and waived a jury trial. The trial then took place on this same day. At the trial, the officer who arrested the appellants testified that, had it not been for the request of the park official that appellants be arrested, he would not have arrested them (R. 52, E. 25). At the conclusion of the State's case, appellants moved for a directed verdict, which motion was taken under advisement by the Court. On May 6, 1960, the Court denied appellants' motion for a directed verdict. Appellants introduced no testimony and renewed their motion for a directed verdict. The Court thereupon entered a verdict of guilty against each of the appellants and imposed a sentence of $25.00 plus costs on each. On June 2, 1960, an appeal to the Court of Appeals of Maryland was filed. On January 18, 1961, the Court of Appeals of Maryland affirmed the judgments rendered against the appellants and a notice of appeal to the Supreme Court of the United States was filed with the Court of Appeals on February 13, 1961. On June 22, 1964 the Supreme Court vacated the judgment and remanded the case to the Court of Appeals of Maryland for consideration in light of *Griffin v. Maryland*, 378 U.S. 130 and *Bell v. Maryland*, 378 U.S. 226. Following such consideration the Court of Appeals of Maryland on October 22, 1964 reinstated and reaffirmed the prior

judgment of conviction. Appellants filed a notice of appeal from this decision on January 20, 1965.

HOW THE FEDERAL QUESTIONS ARE PRESENTED

The first four questions set out above for review in this Court were raised in the Court of first instance, the Circuit Court for Baltimore County, Maryland, generally by pleas of not guilty entered on April 8, 1960. On the same day at the end of the presentation of the State's evidence, the appellants requested a directed verdict of not guilty on the grounds, inter alia, that, if appellants were convicted, they would be denied their constitutional rights under the Fourteenth Amendment to the Constitution of the United States. These contentions were originally made in oral argument. A reference to the record cannot be made since there is no transcript of the oral arguments. In the memorandum filed by appellants in support of their motion for a directed verdict of not guilty, each of the constitutional arguments raised by the first four questions presented here for review were advanced and argued. However, the Circuit Court judge, in his memorandum opinion, did not specifically pass on any of these constitutional arguments. The same constitutional contentions were presented to the Court of Appeals of Maryland in appellants' brief and in oral argument. That Court ruled on Question One on pages 11a-12a of Appendix B, Question No. 3 on pages 9a-10a, Questions Nos. 2 and 4 were not specifically ruled upon by the Court of Appeals but were rejected by the affirmance of the judgments of the Circuit Court.

The fifth question set out above for review by this Court grew out of occurrences subsequent to conviction of Appellants, and the original affirmance of their convictions by the Court of Appeals of Maryland. The question was raised

in the brief of appellants in the Court of Appeals following remand of this case by the Supreme Court. The Court of Appeals ruled on this question on page 5a of Appendix A.

The sixth question presented for review by this Court concerns the effect of the Federal Civil Rights Act of 1964 upon the convictions of appellants. The convictions in this case, their original affirmance by the Court of Appeals of Maryland, and the remand of the case by this Court all took place prior to the enactment of the Federal Civil Rights Act of 1964. The order of the Court of Appeals setting the case for rehearing specified that it should be in accordance with the remand and consequently matters arising from the enactment of the Federal Civil Rights Act of 1964 have not heretofore been considered in this proceeding. Appellants respectfully submit that the matters raised by question six are properly before this court for review. *Hamm v. Rock Hill*, 379 U.S. 306 (1964).

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

1. The arrest and conviction of the appellants are the use of State action to enforce private discrimination, and, therefore, constitute violations of the rights of the appellants under the Fourteenth Amendment.

The State of Maryland, by the decision in this case, has made the act of refusing to leave an amusement park open to the public but owned by a private corporation, when the request to leave arises solely from the policy of the park owner to exclude Negroes, a criminal offense. This case raises therefore the important constitutional question of whether a state can, without violating the Fourteenth Amendment, support by the use of its criminal laws, policies of racial discrimination adopted by owners of places of public resort or amusement. Alternatively stated, has the State of Maryland complied with the duty imposed on

it by the Fourteenth Amendment to enforce equal treatment of all persons similarly situated in a place of public resort or amusement?

It has of course long been the law that a state cannot, under the Fourteenth Amendment, adopt and enforce a policy of racial segregation directly through the use of its criminal laws. *Buchanan v. Warley*, 245 U.S. 60 (1917); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955); *Gayle v. Browder*, 352 U.S. 903 (1956); *State Athletic Commission v. Dorsey*, 359 U.S. 533 (1959). *Moreover, as Shelley v. Kraemer*, 334 U.S. 1 (1948) and *Barrows v. Jackson*, 346 U.S. 249 (1953) clearly indicate, the thrust of the Fourteenth Amendment has not been limited solely to those laws or state actions which enforce racial segregation policies directly adopted or supported by the state. In those cases, judicial enforcement of a discriminatory policy based upon a private agreement was held to be state action and hence within the prohibition set forth in the Fourteenth Amendment. These decisions have been read to mean that a State may not apply its criminal trespass laws to compel a Negro patron to leave a place of public accommodation since this would be to place the weight of State power behind the discriminatory action of the owner or proprietor. As the Supreme Court of Delaware noted in *State v. Brown*, ... Del. ....., 195 A. 2d 379, 386 (1963).

> "In the instant case, the trespass statute, as applied, results in judicial sanction of a policy of racial discrimination. Therefore, just as the State, in *Turner* [*Turner v. City of Memphis*, 369 U.S. 350 (1962)] may not enact a statute which supports racial discrimination, the courts may not apply a statute which results in the fostering of racial discrimination. Therefore, the argument advanced in such cases as [citations omitted], that a trespass prosecution is merely a neutral framework for a vindication of a private property right is

untenable. The State, by intervening on the side of private discrimination, cannot be considered to be acting in a neutral or indifferent manner."

Since the adoption of the Fourteenth Amendment, it has never, we submit, been the law that the owner of a place of business open to the public has the right to discriminate on the basis of race. When, in the *Civil Rights Cases*, 109 U.S. 3 (1883), the Civil Rights Act of 1875 was held unconstitutional, to the extent that it sought to regulate private action, this Court held only that the refusal to any persons of the accommodations of an inn, public conveyance or place of public amusement by an individual *without any sanction or support from any state law or regulation* did not violate the Fourteenth Amendment, because the Fourteenth Amendment relates only to state action. The *Civil Rights Cases* further decided that the Thirteenth Amendment did not sustain the Act since the private discrimination, even though unlawful, did not amount to slavery or involuntary servitude. The Court said, 109 U.S. at p. 24:

> "Now, conceding, for the sake of the argument, that the admission to an inn, a public conveyance, or a place of public amusement, on equal terms with all other citizens, is the right of every man and all classes of men, is it any more than one of those rights which the states by the Fourteenth Amendment are forbidden to deny to any person? And is the Constitution violated until the denial of the right has some State sanction or authority? Can the act of a mere individual, the owner of the inn, the public conveyance or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant, or only as inflicting an ordinary civil injury, properly cognizable by the laws of the State, and presumably subject to redress by those laws until the contrary appears?
>
> "After giving to these questions all the consideration which their importance demands, we are forced to the

> conclusion that such an act of refusal has nothing to do with slavery or involuntary servitude, and that if it is violative of any right of the party, his redress is to be sought under the laws of the State; or if those laws are adverse to his rights and do not protect him, his remedy will be found in the corrective legislation which Congress has adopted, or may adopt, for counteracting the effect of State laws, or State action, prohibited by the Fourteenth Amendment . . ."

This Court, thus, did not hold that the owner of an inn, public conveyance or place of public amusement had a constitutional right to discriminate on the basis of race. On the contrary, this Court assumed that there was a right in all citizens to frequent such places without discrimination on grounds of race or color. See also 109 U.S. at pp. 19, 21, 23, and Justice Harlan's dissent, 109 U.S. at 41-43. This Court merely held that the Federal Government was without power to impose sanctions for violation of the federally created right against the private persons who were the owners of such places of business. Several of the states have remedied the situation in which Federal law creates a right, which is, nevertheless, imperiled by lack of an adequate remedy, through the passage of civil rights acts patterned on the Federal statute. That Maryland did not have such a civil rights act at the time of the events with which we are here concerned meant no more than that the federally created right not to be discriminated against in a place of public amusement did not have, in Maryland, adequate enforcement machinery against purely private discrimination.[2] This did not mean, however, that the owner of a place of public amusement had a right to discriminate. A fortiori, it did not mean that he could call

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[2] Accustomed as we now are to enforcement of federally created rights by direct federal action, we should not lose sight of the fact that such a technique for a federal government marked a great inno-

on the State of Maryland for aid in discriminating. As was said in *Shelley v. Kraemer, supra*, 334 U.S. at 22:

> "It would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment."

For a state to create and enforce a "right" of an owner of a business open to the public to discriminate on the basis of race would be state action within the meaning of the Fourteenth Amendment, and, therefore, subject to the restrictions of that amendment. And even though it be assumed that the owner of purely private property has a constitutional right to the enjoyment of his property without interference from others, it must be remembered that the property here involved has been thrown open to public use. The statute under which appellants were convicted required an express determination that the amusement

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vation when adopted in 1789. As that acute observer of the American political system, Alexis deTocqueville, pointed out with respect to the Constitution:

> "This Constitution, which may at first sight be confounded with the Federal constitutions which preceded it, rests upon a novel theory, which may be considered as a great invention in modern political science. In all the confederations which had been formed before the American Constitution of 1789 the allied States agreed to obey the injunctions of a Federal Government; but they reserved to themselves the right of ordaining and enforcing the execution of the laws of the Union. The American States which combined in 1789 agreed that the Federal Government should not only dictate the laws but that it should execute its own enactments. In both cases the right is the same, but the exercise of the right is different; and this alteration produced the most momentous consequences." deTocqueville, *Democracy in America* (Oxford University Press, 1947), pages 88-89.

Adoption of the Fourteenth Amendment represented a return, in one limited instance, to the earlier general practice of committing enforcement of a federally created right to the several states. That a state might fail in its obligation to enforce such a right does not create a "right" in those who thereupon flaunt the federal right.

park was a *place of public resort or amusement.* The effect of the conduct by the owner of a business open to the public must be considered. This Court in *Marsh v. Alabama,* 326 U.S. 501, 506 (1946), pointed out that:

> "Ownership does not always mean absolute dominion. The more the owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it . . ."

It is apparent, therefore, that the basic premises of the Maryland Court of Appeals in the instant case concerning the supposed rights of the owner of a business to discriminate on the basis of race — and to seek state assistance in such discrimination — have never been supported by this Court.

This issue was the subject under discussion in the concurring and dissenting opinions of members of this Court in *Bell v. Maryland,* 378 U.S. 226, 242, 286, 318 (1964). The views expressed in that case on this issue were reaffirmed in the various concurring opinions of members of this Court in *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964) and *Katzenbach v. McClung,* 379 U.S. 294 (1964). Appellants respectfully submit that the constitutional issue raised by this question is not only of substantial merit but also of great national importance meriting therefore plenary consideration by this Court with briefs on the merits and oral argument.

2. The arrest and conviction of the appellants are the denial of the rights of the appellants to freedom of speech and freedom of assembly.

The attendance of the white and Negro appellants together at a celebration named "All Nations Day" was more than merely an attempt to enjoy a public amusement park.

Their very association together symbolized the idea expressed by an "All Nations Day" celebration. They were, therefore, exercising their rights of freedom of speech and freedom of association, and the arrest and conviction of the appellants for disorderly conduct for exercising these rights is in contravention of the Fourteenth Amendment. If the appellants were, when arrested, carrying signs proclaiming the idea expressed by their association together, they would clearly be protected from arrest and conviction by the interpretation given the Fourteenth Amendment in *Marsh v. Alabama, supra,* and in *Terminiello v. Chicago,* 337 U.S. 1 (1949). Yet no placard could have expressed with greater eloquence the point of view which appellants displayed by appearing together in public despite their difference in color. The effect of the *Marsh* decision is that, where a private property owner invites the general public onto his property for his own benefit, the owner relinquishes his right to exclude members of the public at will where their activities are peaceful and in furtherance of the rights of freedom of speech and assembly. In the instant case, the owner of the amusement park, by admitting members of the public at large (except for Negroes) relinquished his right to exclude the appellants while they, by their very act of associating together, exercised the right of free speech to advocate the breaking down of artificial barriers based upon race.

3. The arrest and conviction of the appellants without any evidence that the appellants acted in any way in a disorderly manner to the disturbance of the public peace are a denial of the rights of the appellants under the Fourteenth Amendment.

The record in this case is clear that appellants, prior to their arrest for acting in a disorderly manner, did no more than politely refuse to leave a public amusement park when

asked to leave as a result of the owner's policy to exclude Negroes. Appellants did nothing that was in any way disorderly and the hostile crowd did not assemble until after the park officials themselves had created a scene by calling attention to the appellants and by seeking to put the owner's discriminatory policy into effect.

To allow individuals who have behaved in a peaceful manner to be convicted of acting in a disorderly manner because of the effect of their peaceful conduct on a crowd of hostile onlookers would make a mockery of our concepts of criminal conduct. One is reminded of the hapless soul who, upon being strangled, is told by his assailant that unless he removes his neck from the assailant's hands, the assailant will not be responsible for the consequences. Their convictions clearly run counter to the decision in *Barr v. City of Columbia*, 378 U.S. 146 (1964), where this Court was reluctant to assume that a State breach-of-peace statute would be applicable in view of the frequent occasions on which the Court had reversed under the Fourteenth Amendment convictions of peaceful individuals who were convicted of breach of the peace because of the acts of hostile onlookers. *Henry v. City of Rock Hill*, 376 U.S. 776 (1964); *Wright v. Georgia*, 373 U.S. 284 (1963); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Taylor v. Louisiana*, 370 U.S. 154 (1962); *Garner v. Louisiana*, 368 U.S. 157 (1961); *Terminiello v. Chicago*, *supra*.

It is clear from the record here that there is no evidence of disorderly conduct on the part of appellants. The convictions should therefore not stand. *Barr v. City of Columbia*, *supra*; *Thompson v. City of Louisville*, 362 U.S. 199 (1960). Cf. *Niemotko v. Maryland*, *supra*, which upset a conviction under the same criminal statute here involved. There the defendants' actions were taken in the face of

police orders and threats of arrest if the orders were disobeyed. See *Niemotko v. State*, 194 Md. 247, 250, 71 A. 2d 9, 10 (1950).

4. The arrest and conviction of the appellants for disorderly conduct in face of the failure of the State to arrest and convict members of the crowd who were actually engaged in disorderly conduct are a denial to the appellants of equal protection of the laws.

The evidence clearly shows that the members of the crowd which surrounded the appellants and the police actually engaged in the only disorderly conduct which took place. The crowd spat, kicked and used improper language. The appellants were polite and mannerly at all times. Neither the park owner nor the police made any attempt to quell the disorder or to arrest any of the members of the crowd engaged in such conduct. The arrest and conviction of the appellants under such circumstances denied appellants equal protection of the law. *Pace v. Alabama*, 106 U.S. 583 (1882).

5. The singling out of appellants for prosecution and conviction while the State has proceeded to discontinue and dismiss prosecutions in approximately 200 other cases arising out of demonstrations at the same place of public resort or amusement is a denial to appellants of due process and equal protection of the laws under the Fourteenth Amendment.

The manner in which a law is enforced may render an otherwise constitutionally valid measure invalid. While a statute may not be rendered ineffective solely through non-use, e.g., *Louisville & N. R. Co. v. United States*, 282 U.S. 740, 759 (1931); *Snowden v. Snowden*, 1 Bland (Md. Chan.) 550, 556-58 (1829), it may not be applied discrim-

inatorily to members of the same class. The Fourteenth Amendment prevents the unequal enforcement of valid laws as well as any enforcement of invalid laws. *Yick Wo v. Hopkins,* 118 U.S. 356 (1886). See also *Hillsborough v. Cromwell,* 326 U.S. 620, 623 (1946), and the cases cited therein.

Gwynn Oak Park, the scene of the alleged offenses of appellants, was the subject of a number of sit-in demonstrations in the summer of 1963. The demonstrations achieved their objective, for the park abandoned its segregation policy. In the course of the demonstrations approximately 200 arrests were made. The State's Attorney of Baltimore County has done nothing about bringing these other cases on for trial, and has proceeded to discontinue and dismiss said prosecutions. Considerations of due process and equal protection under the Fourteenth Amendment should prohibit the continuation of the convictions of Appellants.

6. The Federal Civil Rights Act of 1964, 78 Stat. 241, requires the abatement of the pending convictions and the dismissal of the prosecutions of the appellants.

Appellants were convicted in the Circuit Court for Baltimore County, Maryland on May 6, 1960, and those convictions were originally affirmed by the Court of Appeals of Maryland on January 18, 1961. Both the convictions and the affirmance took place well prior to the enactment of the Federal Civil Rights Act of 1964 which was signed into law on July 2, 1964. The case was, however, on appeal to this Court or on remand to the Maryland Court of Appeals throughout the intervening period.

On June 22, 1964, this Honorable Court vacated the judgment entered by the Court of Appeals of Maryland on January 18, 1961 and remanded the case to the Court of Appeals

for consideration in light of *Griffin v. Maryland*, 378 U.S. 130 and *Bell v. Maryland*, 378 U.S. 226. On July 31, 1964, the Court of Appeals ordered the case set for hearing upon the matters to be considered in accordance with the remand. In view of the terms of the remand and the order of the Court of Appeals, matters arising from the enactment of the Federal Civil Rights Act have not heretofore been considered in this proceeding.

However, it is clear that the judgments in this case are not yet final, *Bell v. Maryland, supra,* and that these convictions which are now on direct review must abate since the conduct in question is rendered no longer unlawful by the Civil Rights Act of 1964. *Hamm v. Rock Hill*, 379 U.S. 306 (1964). As Chief Justice Hughes noted in *United States v. Chambers*, 291 U.S. 217, 226 (1934):

> "Prosecution for crimes is but an application or enforcement of the law, and if the prosecution continues the law must continue to vivify it."

See also *United States v. Schooner Peggy*, 1 Cranch 103 (1801); *Yeaton v. United States*, 5 Cranch 281 (1809); *Maryland v. Baltimore & O. R. Co.*, 3 How. 534 (1845); *United States v. Tynen*, 11 Wall. 88 (1870); *United States v. Reisinger*, 128 U.S. 398 (1888); *Massey v. United States*, 291 U.S. 608 (1934).

Appellants assert that there are a number of incontrovertible facts establishing that the Gwynn Oak public amusement park is covered by the Federal Civil Rights Act of 1964, 78 Stat. 241:

1. The operations of the cafeteria on the premises of the amusement park (a cafeteria being an establishment described in paragraph (2) of section 201(b) of the Act) affect commerce in that a substantial portion of the food

which it serves has moved in commerce (as provided in Sec. 201(c)(2)).

Given that the cafeteria is a covered establishment, the amusement park is also covered under the provisions of Sec. 201(b)(4) and (c)(4) since there is physically located within the premises of the amusement park a covered establishment, the cafeteria, and since the amusement park holds itself out as serving the patrons of such covered establishment.

2. The amusement park is a covered establishment since it is an "other place of exhibition or entertainment" referred to in Sec. 201(b)(3) and its operations affect commerce since it customarily presents performances, exhibitions, or other sources of entertainment which move in commerce as provided in Sec. 201(c)(3) of the Act.

Alternatively, if the view is taken that the amusement park is not a covered establishment as indicated above because the operations discussed do not affect commerce, it is asserted that it nevertheless would have been a covered establishment at the time of the events with which we are here concerned on the following grounds:

1. Discrimination or segregation by the cafeteria was supported by State action (as provided in Section 201(b) and (d)) since such discrimination or segregation was carried on under color of a custom or usage required or enforced by officials of the State or political subdivision thereof. In this case, the discriminatory custom or usage was enforced by the police officers of Baltimore County, Maryland and by the courts of the State of Maryland.

Since state action enforced discrimination by the cafeteria, thereby making it a covered establishment, the amusement park was also a covered establishment since

there was physically located within its premises a covered establishment and since it held itself out as serving the patrons of said covered establishment (as provided in Sec. 201(b)(4)).

2. The amusement park itself was an "other place of exhibition or entertainment" under Section 201(b)(3) of the Act and was a place of public accommodation thereunder since discrimination or segregation by it was supported by State action.

Said discrimination or segregation by the amusement park was supported by State action within the meaning of the Act in that such discrimination or segregation was carried on under color of a custom or usage required or enforced by officials of the State or a political subdivision thereof (as provided by Sec. 201(d)).

CONCLUSION

It is submitted that the decisions of the Court of Appeals of Maryland fail to recognize the limitations imposed by the Fourteenth Amendment upon the State's power 1) to enforce discrimination in places of public resort or amusement through the use of its criminal laws; 2) to punish, through the use of its criminal laws, exercises of the right to freedom of speech and freedom of assembly; 3) to convict a person for a violation of a criminal statute without any evidence of the substantial elements of the crime; 4) to arrest and convict a person of violation of a criminal statute when the evidence clearly shows that others were the only persons in violation of said statute and such persons were not proceeded against in any way; 5) to prosecute and convict a person under the criminal laws for acts arising out of sit-in demonstrations when prosecutions in approximately 200 other cases arising out of such demon-

strations at the same place of public resort or amusement are being discontinued and dismissed; and 6) that said decisions fail to give due consideration to the effect upon the prosecutions and pending convictions of the appellants of the enactment of the Civil Rights Act of 1964.

We believe that the questions presented by this appeal are substantial and are of public importance. As this Court noted in *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948):

> "The problem of defining the scope of the restrictions which the Federal Constitution imposes upon exertions of power by the States has given rise to many of the most persistent and fundamental issues which this Court has been called upon to consider."

Respectfully submitted,

FRANCIS D. MURNAGHAN, JR.,
PAUL S. SARBANES,
1400 Mercantile Trust Building,
Baltimore, Maryland 21202
Attorneys for Appellants.

APPENDIX A

Opinion of Court of Appeals of Maryland on Remand from the Supreme Court of the United States

(Decided October 22, 1964)

236 Md. 349, 204 A. 2d 64

Horney, J. (Dissenting Opinion by Oppenheimer, J.)—

The appellants were convicted in 1960 of violating Code (1957), Art. 27, § 123, by "acting in a disorderly manner to the disturbance of the public peace" in a place of "public resort or amusement." On the appeal to this Court, the convictions were affirmed in *Drews v. State*, 224 Md. 186, 167 A. 2d 341 (1961). Having found that Gwynn Oak Amusement Park in Baltimore County was a place of public resort or amusement within the meaning of the statute, we held that the conduct of the appellants — two of whom were white men, one a white woman, and the other a colored woman — during the course of a demonstration protesting the segregation policy of the park, by joining arms and dropping to the ground after they had refused to obey a lawful request to leave the privately owned park, was disorderly in that it "disturbed the public peace and incited a crowd." We also held that the action taken by the county police, in arresting the appellants for disorderly conduct (after the police at the request of the park manager had asked them to leave and again they refused), did not constitute state enforcement of racial discrimination in violation of the Fourteenth Amendment of the United States. A direct appeal was thereafter taken to the Supreme Court of the United States, which, in a *per curiam* filed June 22, 1964, in *Drews v. Maryland*, 378 U.S. 547, vacated the judgments and remanded the case to this Court "for consideration in light of *Griffin v. Maryland* [378 U.S. 130] and *Bell v. Maryland* [378 U.S. 226]," decided on the same day as *Drews*.

In *Griffin v. State*, 225 Md. 422, 171 A. 2d 717 (1961), where the park officer was authorized to make arrests

either as a paid employee of a detective agency then under contract to protect and enforce the racial segregation policy of the operator of Glen Echo Amusement Park in Montgomery County or as a nonsalaried special deputy sheriff of the county, we affirmed the conviction of the appellants for trespassing on private property in violation of Code (1957), Art. 27, § 577, when they refused to leave the premises after having been notified to do so. But the Supreme Court in *Griffin v. Maryland, supra,* held that the arrest of the appellants by the park officer was state action in that he was possessed of state authority and purported to act under that authority, and reversed the judgment. In *Bell v. State,* 227 Md. 302, 176 A. 2d 771 (1962), where the appellants had entered the private premises of a restaurant in Baltimore City in protest against racial segregation, sat down and refused to leave when asked to do so on the theory that their action in remaining on the premises amounted to a permissible verbal or symbolic protest against the discriminatory practice of the owner, we affirmed the convictions for criminal trespass for the reason that the right to speak freely and to make public protest did not import a right to invade or remain on privately owned property so long as the owner retained the right to choose his guests or customers. The Supreme Court granted certiorari. In the interim between the decision of this Court and the decision of the Supreme Court, both the city and state enacted "public accommodation laws." When the Supreme Court decided *Bell v. Maryland, supra,* it reversed the judgment of this Court and remanded the case for a determination by us of the effect of the subsequently enacted public accommodation laws on pending criminal trespass convictions.[1]

On the remand of this *Drews* case, the appellants raise two questions. In effect they contend: (i) that their arrest and conviction constitutes state action in the light of the decision in *Griffin v. Maryland, supra;* and (ii) that to uphold their conviction now for acts arising out of sit-in dem-

(1) See Bell v. State, 236 Md. 356, 204 A. 2d 54 (1964), decided on the remand on or about the same time as this case.

onstrations at Gwynn Oak Amusement Park would be to deny them due process and equal protection because the State's Attorney for Baltimore County has failed to prosecute approximately two hundred other cases charging the same offense.

(i)

In reconsidering the convictions of the "Drews" appellants in the light of *Griffin v. Maryland, supra,* we find nothing therein which compels or requires a reversal of our decision in *Drews v. State* (224 Md. 186). Significantly, the question as to whether the same result would have been reached by the Supreme Court had the arrests in *Griffin* been made by a regular police officer, as in the *Drews* case, was not decided. The arrests and subsequent convictions of the appellants for criminal trespass were held in *Griffin* to constitute state action because the arresting officer, a park employee, was also a special deputy sheriff. In *Drews,* however, the appellants not only refused to leave the amusement park peacefully after they had been requested to do so, but acted in a disorderly manner when the arresting officers, who were county police officers, not park employees, undertook to eject them. The record in *Drews* does not show, nor has it ever been contended, that the park employee, who assisted the arresting officers, had power (as was the case in *Griffin*) to make arrests. By reversing *Griffin* and remanding *Drews,* the Supreme Court must have had some doubt as to whether the two cases were distinguishable. We think there are important differences in the two cases between the reasons or causes for the arrests and the type of police personnel that made the arrests, and that such distinctions are controlling.

In *Drews,* where the trespassers conducted themselves in a disorderly manner when the police undertook to forcibly eject them from the amusement park in an effort to prevent them from further inciting the gathering crowd by remaining in the park after they had been requested to leave by the park manager as well as the county police, the arrests were made by policemen who were not employed by the park, who were not paid by the park, and

who were under no orders of any park official. The very fact that the police made no move to eject the trespasser from the park until they were requested to do so by the manager shows the complete absence of any cooperative state action. Nor was there any evidence that the State desired or intended to maintain the amusement park as a segregated place of amusement. In these circumstances, it seems clear to us that the arrest of the Drews appellants (who were both white and colored) for disorderly conduct did not constitute state enforcement of racial discrimination. To hold otherwise would, we think, not only deny the park owners equal protection of the laws, but could seriously hamper the power of the State to maintain peace and order and, when imminent as was the case here, to forestall mob violence or riots.

We deem it unnecessary to elaborately discuss the only two cases cited by the appellants — *State v. Brown*, 195 A. 2d 379 (Del. 1963), and *Wright v. Georgia*, 373 U.S. 284 (1963). Neither is apposite here and, assuming they are, both are clearly distinguishable on the facts. Even if the arrest of the Drews appellants for disorderly conduct was the result of or arose out of their ejection from the park for trespassing on private property, there was no violation of a constitutional guarantee. We reiterate what was recently said in *In Matter of Cromwell*, 232 Md. 409, 413, 194 A. 2d 88 (1963), that "we find no violation of the Fourteenth Amendment in the assertion of a private proprietor's right to choose his customers, or to eject those who are disorderly." We see no reason to reverse the convictions in this case.

The reason for the remand of the case for consideration in the light of *Bell v. Maryland, supra*, is not clear. The judgments in *Bell* were vacated and the case remanded to enable this Court to pass upon the effect of supervening public accommodation laws on the criminal trespass law. Since there is no provision in the public accommodation law enacted by the State (Code, 1964 Supp., Art. 49B, § 11) with respect to amusement parks, we need not decide the effect of the supervening legislative enactment on the convictions in this case.

(ii)

The second contention of the appellants — that the failure of the State to prosecute others for the same or similar offenses is a denial of due process or equal protection — is without merit and has no bearing on the convictions in this case. Guilt or innocence cannot be made to depend on the question of whether other parties have not been prosecuted for similar acts. *Callan v. State*, 156 Md. 459, 466, 144 Atl. 350 (1929). Nor is the exercise of some selectivity in the enforcement of a criminal statute, absent a showing of unjustifiable discrimination, violative of constitutional guarantees. *Oyler v. Boles*, 368 U.S. 448 (1962). See also *Moss v. Hornig*, 314 F. 2d 89 (C.A. 2d 1963).

Judgments reinstated and reaffirmed; appellants to pay the costs.

OPPENHEIMER, J. (dissenting)—

In *Griffin v. Maryland*, 378 U.S. 130 (1964), the Supreme Court of the United States reversed the judgments against the defendants affirmed by us in *Griffin v. State*, 225 Md. 422, 171 A. 2d 717 (1961) on the ground that the arrests were the products of State action taken because the defendants were Negroes, and therefore racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. In *Griffin*, the arresting officer, Gollins, was a deputy sheriff of Montgomery County employed by and subject to the direction and control of the amusement park. The record shows that in this case the special policeman, Officer Wood, was in the employ of the amusement park but it does not show whether or not he had been deputized by Baltimore County. Pursuant to the instructions of the park's management, Wood told the defendants the park was closed to Negroes, ordered them to leave and, when they did not, sent for the Baltimore County police. He and the county police together removed the defendants from the park.

If Wood, the "special officer" in this case, had virtually the same authority from Baltimore County that Collins had

from Montgomery County, it seems to me immaterial that he called in the Baltimore County police to help him evict the defendants. He was the proximate cause of the arrests. If his authority stemmed from the State, then under *Griffin v. Maryland, supra*, the State was a joint participant in the discriminatory action.

On the facts, it also seems immaterial that the convictions here were for disorderly conduct rather than for trespass as in *Griffin*. In resisting the command of the officers to leave the park, the defendants used no force against the officers or anyone else; they held back or fell to the ground. Such failure to obey the command, if the command itself was violative of the Constitution, would not sustain the convictions. *Wright v. Georgia*, 373 U.S. 284, 291, 292 (1963).

The Baltimore County Code authorizes the county to appoint special police officers to serve for private persons or corporations. Baltimore County Code, Sections 24-13 and 35-3 (1958). I would remand this case to the Circuit Court for Baltimore County for the taking of additional testimony to determine whether or not Wood was appointed by Baltimore County under these sections of its Code. If he was, the convictions should be reversed.

APPENDIX B

Opinion of Court of Appeals of Maryland

(Decided January 18, 1961)

224 Md. 186, 167 A. 2d 341

Hammond, J.:

The four appellants were convicted by the court sitting without a jury of violating Code (1957), Art. 27, Sec. 123, by "acting in a disorderly manner to the disturbance of the public peace" in a "place of public resort or amusement." Two of appellants are white men, one is a white woman, and the other a Negress. Accompanied by a Negro who was not tried, they had gone as a group to

Gwynn Oak Amusement Park in Baltimore County, which as a business policy does not admit Negroes, and were arrested when they refused to leave after being asked to do so.

Appellants claim that there was no evidence that the Park is a place of public resort or amusement, that if there were such evidence the systematic exclusion of Negroes prevents the Park from being regarded as such a public place, that they were not guilty of disorderly conduct and, finally, if the Park is a place of public resort or amusement their presence there was in the exercise of a constitutional right, and their arrest and prosecution amounted to State action to enforce segregation in violation of the Constitution of the United States.

There is no direct statement in the record that the Park is a place of public resort or amusement but we think the evidence clearly permitted the finding the trial court made that it is. There was testimony which showed, or permitted the inference, that the Park is owned by a private corporation, that it has been in operation each summer for many years, that among its attractions are a miniature golf course and a cafeteria, that appellants' conduct occurred on "All Nations Day" which usually attracts a large crowd, that on that day the Park was so crowded there was but elbow room to walk, and that the Park's policy was to welcome everyone but Negroes. The trial court properly could have concluded the Park is a place resorted to by the general public for amusement. Cf. *Iozzi v. State*, 224 Md. 42.

A lawmaking body is presumed by the Courts to have used words in a statute to convey the meaning ordinarily attributed to them. In recognition of this plain precept the Courts, in construing zoning, licensing, tax and anti-discrimination statutes, have held that the term place of public resort or amusement included dance halls, swimming pools, bowling alleys, miniature golf courses, roller skating rinks and a dancing pavilion in an amusement park (because it was an integral part of the amusement park), saying that amusement may be derived from participation as well as observation. *Amos v. Prom, Inc.*,

117 F. Supp. 615; *Askew v. Parker* (Cal. App.), 312 P. 2d 342; *Jaffarian v. Building Com'r* (Mass.), 175 N.E. 641; *Jones v. Broadway Roller Rink Co.* (Wis.), 118 N.W. 170, 171; *Johnson v. Auburn & Syracuse Electric R. Co.* (N.Y.), 119 N.E. 72. Section 123 of Art. 27 proscribes conduct which disturbs the public peace at a place where a number of people are likely to congregate, whether it is on governmental property or on property privately owned. This is made clear by the prohibition of offensive conduct not only on any public street or highway but in any store during business hours, and in any elevator, lobby or corridor of an office building or apartment house having more than three dwelling units, as well as in any place of public worship or any place of public resort or amusement. We read the statute as including an amusement park in the category of a place of public resort or amusement.

We find no substance in the somewhat bootstrap argument that the regular exclusion of Negroes from the Park kept it from being within the ambit of the statute. Early in the common law the duty to serve the public without discrimination apparently was imposed on many callings. Later this duty was confined to exceptional callings, as to which an urgent public need called for its continuance, such as innkeepers and common carriers. Operators of most enterprises, including places of amusement, did not and do not have any such common law obligation, and in the absence of a statute forbidding discrimination, can pick and choose their patrons for any reason they decide upon, including the color of their skin. Early and recent authorities on the point are collected, and exhaustively discussed, in the opinion of the Supreme Court of New Jersey in *Garifine v. Monmouth Park Jockey Club*, 148 A. 2d 1. See also *Greenfeld v. Maryland Jockey Club*, 190 Md. 96; *Good Citizens Community Protective Assoc. v. Board of Liquor License Commissoners*, 217 Md. 129, 131; *Slack v. Atlantic White Tower System, Inc.*, 181 F. Supp. 124; *Williams v. Howard Johnson's Restaurant*, 268 F. 2d 845.

It has been noted in the cases that places of public accommodation, resort or amusement properly can exclude would-be patrons on the grounds of improper dress or

uncleanliness, *Amos v. Prom, Inc., supra* (at page 629 of 117 F. Supp.); because they are under a certain age, are men or are women, or are unescorted women, *Collister v. Hayman* (N.Y.), 76 N.E. 20; or because for some other reason they are undesirables in the eyes of the establishment. *Greenfeld v. Maryland Jockey Club; Good Citizens Protective Assoc. v. Board of Liquor License Commissioners; Slack v. Atlantic White Tower System, Inc.*, all *supra*. See 86 C.J.S. *Theaters and Shows* Secs. 31 and 34 to 36. We have found no decision holding that a policy of excluding certain limited kinds or classes of people prevents an enterprise from being a public resort or amusement, and can see no sound reason why it should.

Appellants' argument that they were not disorderly is that neither the mere infringement of the rules of a private establishment nor a simple polite trespass constitutes either a breach of the peace or disorderly conduct. We find here more than either of these, enough to have permitted the trier of fact to have determined as he did that the conduct of appellants was disorderly.

It is said that there was no common law crime of disorderly conduct. Nevertheless, it was a crime at common law to do many of the things that constitute disorderly conduct under present day statutes, such as making loud noises so as to disturb the peace of the neighborhood, collecting a crowd in a public place by means of loud or unseemly noises or language, or disturbing a meeting assembled for religious worship or any other lawful purpose. *Hochheimer on Crimes and Criminal Procedure*, Sec. 392 (2nd Ed.); *1 Bishop on Criminal Law*, Sec. 542 (9th Ed.); *Campbell v. The Commonwealth*, 59 Pa. St. Rep. 266.

The gist of the crime of disorderly conduct under Sec. 123 of Art. 27, as it was in the cases of common law predecessor crimes, is the doing or saying, or both, of that which offends, disturbs, incites, or tends to incite, a number of people gathered in the same area. 3 Underhill, *Criminal Evidence*, Sec. 850 (5th Ed.), adopts as one definition of the crime the statement that it is conduct "of such a nature as to affect the peace and quiet of persons who

may witness the same and who may be disturbed or provoked to resentment thereby." Also, it has been held that failure to obey a policeman's command to move on when not to do so may endanger the public peace, amounts to disorderly conduct. *Bennett v. City of Dalton* (Ga. App.), 25 S.E. 2d 726, appeal dismissed, 320 U.S. 712, 88 L. Ed. 418. In *People v. Galpern* (N.Y.), 181 N.E. 572, 574, it was said, under a New York statute making it unlawful to congregate with others on a public street and refuse to move on when ordered by the police, that refusal to obey an order of a police officer, not exceeding his authority, to move on "even though conscientious — may interfere with the public order and lead to a breach of the peace," and that such a refusal "can be justified only where the circumstances show conclusively that the police officer's direction was purely arbitrary and was not calculated in any way to promote the public order." See also *In re Neal*, 164 N.Y.S. 2d 549 (where the refusal of a school girl to leave a school bus when ordered to do so by the authorities was held to be disorderly conduct, largely because of its effect on the other children); Underhill, in the passage cited above, concludes that "failure to obey a lawful order of the police, however, such as an order to move on, may amount to disorderly conduct." See also *People v. Nixon* (N.Y.), 161 N.E. 463; 27 C.J.S. *Disorderly Conduct*, Sec. 1(4) f; annotation 65 A.L.R. 2d 1152; compare *People v. Carcel* (N.Y.), 144 N.E. 2d 81; and *People v. Arko*, 199 N.Y.S. 402.

Appellants refused to leave the Park although requested to do so many times. A large crowd gathered around them and the Park employee who was making the requests, and seemed to "mill in and close in" so that the employee sent for the Baltimore County police. The police, at the express direction of the manager of the Park, asked the appellants to leave and again they refused, even when told they would be arrested if they did not. Admittedly they were then deliberately trespassing. That they intended to continue to trespass until they were forcibly ejected is made evident by their conduct when told they were under arrest. The five joined arms as a symbol of

united defiance and then two of the men dropped to the ground. Two of the appellants had to be carried from the Park, the other three had to be pushed and shoved through the crowd. The effect of the appellants' behavior on the crowd is shown by the testimony that its members spit and kicked and shouted threats and imprecations, and that the Park employees feared a mob scene was about to erupt. The conduct of appellants in refusing to obey a lawful request to leave private property disturbed the public peace, and incited a crowd. This was enough to sustain the verdict reached by Judge Menchine.

We turn to appellants' argument that the arrest by the County police constituted State action to enforce a policy of segregation in violation of the ban of the Equal Protection and Due Process clauses of the Fourteenth Amendment against State-imposed racial discrimination. The Supreme Court said in the racial covenant case of *Shelley v. Kraemer*, 334 U.S. 1, 13, 92 L. Ed. 1161, 1180: "The action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful". The Park had a legal right to maintain a business policy of excluding Negroes. This was a private policy which the State neither required nor assisted by legislation or administrative practice. The arrest of appellants was not because the State desired or intended to maintain the Park as a segregated place of amusement; it was because the appellants were inciting the crowd by refusing to obey valid commands to move from a place where they had no lawful right to be. Both white and colored people acted in a disorderly manner and the State, without discrimination, arrested and prosecuted all who were so acting.

While there can be little doubt that the Park could have used its own employees to eject appellants after they refused to leave, if it had attempted to do so there would have been real danger the crowd would explode into riotous action. As Judge Thomsen said in *Griffin v. Collins*, 187 F. Supp. 149, 153, in denying a preliminary injunction and

a summary judgment in a suit brought to end the segregation policy of the Glen Echo Amusement Park near Washington: "Plaintiffs have cited no authority holding that in the ordinary case, where the proprietor of a store, restaurant, or amusement park, himself or through his own employees, notifies the Negro of the policy and orders him to leave the premises, the calling in of a peace officer to enforce the proprietor's admitted right would amount to deprivation by the state of any rights, privileges or immunities secured to the Negro by the Constitution or laws. Granted the right of the proprietor to choose his customers and to eject trespassers, it can hardly be the law, as plaintiffs contend, that the proprietor may use such force as he and his employees possess but may not call on a peace officer to enforce his rights."

The Supreme Court has not spoken on the point since Judge Thomsen's opinion. The issue was squarely presented for decision in *Boynton v. Virginia*, 364 U.S. 454, 5 L. Ed. 2d 206, but the Court chose to decide the case on the basis that the conviction of a Negro for unlawfully remaining in a segregated bus terminal restaurant violated the Interstate Commerce Act, which uses broad language to forbid a carrier from discriminating against a passenger. In the absence of controlling authority to the contrary, it is our opinion that the arresting and convicting of appellants on warrants sworn out by the Park for disorderly conduct, which resulted from the Park enforcing its private, lawful policy of segregation, did not constitute "such action as may fairly be said to be that of the States." It was at least one step removed from State enforcement of a policy of segregation and violated no constitutional right of appellants.

JUDGMENTS AFFIRMED, WITH COSTS.

APPENDIX C

Memorandum Opinion of Circuit Court for Baltimore County

(Filed May 6, 1960)

Unreported

The facts of the case are not in serious dispute. On Sunday, September 6, 1959, at the Gwynn Oak Amusement Park, located in Baltimore County, "All Nations Day" was being celebrated. It was a "right crowdy day * * *. There was just more or less elbow room when you walked anywhere in the park" (Tr. 48). The Park is privately owned by a corporation, known as Gwynn Oak, Incorporated. There is no evidence that there was any sign or signs to indicate that any particular segment of the population would not be welcome, so that for the purpose of this case it is assumed by the Court that there were no such signs.

At about 3 o'clock in the afternoon, a special officer employed by Gwynn Oak Park, Incorporated observed five persons in approximately the center of the Park, near the cafeteria and miniature golf course. This employee approached the group, consisting of three white and two colored persons, and advised them that the Park was closed to colored people, and that the colored people would have to leave (Tr. 19). It was explained that the management of the Park had a policy opposing the use of the Park by colored persons. The request that the colored persons leave was repeated four or five times (Tr. 21). All five persons were very polite (Tr. 22), but, in response to the request that they leave, one of the members of the group stated that he was enjoying himself, and that he thought he would stay and look around. The first request to leave was directed to the two colored people, but when they refused to leave the whole group of five persons was asked to go, but all refused (Tr. 22).

There was no crowd surrounding the group at the time of the initial observation by the special officer, but the crowd began to congregate after the five persons were

asked to leave the Park by the special officer (Tr. 37). The special officer sought the assistance of the Baltimore County Police, who were stationed at the entrance to the Park, after first confirming with the management of the latter's desire to forbid the continued presence of colored persons upon the property. Upon such confirmation, the Baltimore County Police were summoned to the area where the five persons were and by the time of the arrival of the Baltimore County Police a crowd had gathered (Tr. 47). The Baltimore County Police requested the group of five persons to leave the Park two or three times before the arrest (Tr. 35). The period of time between the time of the initial request to leave and the time of actual arrest covered a period of about ten or fifteen minutes (Tr. 36).

Prior to the actual arrest, a good sized crowd gathered around and seemed to mill in and close in on the group and the police. The crowd was milling around and seemed very angry (Tr. 23), and seemed at the point where it would get out of control and became a mob scene (Tr. 26 and 27).

In spite of the requests by the employee of the management and the two or three requests by Baltimore County Police that the group leave the Park, the five persons steadfastly refused to move. They were thereupon placed under arrest and at that time joined their arms together. Two men in the group dropped to the ground in a prone or semi-prone position. All were escorted from the premises by the police with a degree of resistance. The resistance took the form in two instances of requiring the police physically to carry them; the resistance as to the other three took the form of merely holding back as they were being walked out of the Park.

On these facts the State has elected to bring this prosecution by way of criminal information on the statutory charge of disturbing the peace under Article 27, Section 123.

The reasonable inference exists that the group was not aware that the management had adopted a policy of barring persons because of color at the time of their entry

upon the property. The evidence is clear, however, that this management policy became known to the accused through statements to them by an employee of the corporation, and by the Baltimore County Police, before the arrest was made.

The first question which arises in the case is the question whether an owner of private property to which substantial numbers of persons are invited has any right to discriminate with respect to persons invited thereon, that is to say, whether such owner may exercise his own arbitrary freedom of selection in determining who will be admitted to and who will be permitted to remain upon his property under circumstances where such private property is being used as a place of resort or amusement. This question has been clearly answered in the affirmative by the authorities. In *Madden v. Queens County Jockey Club*, 72 N.E. 2d 697 (Court of Appeals of New York), it was said at page 698:

> "At common law a person engaged in a public calling, such as innkeeper or common carrier, was held to be under a duty to the general public and was obliged to serve, without discrimination, all who sought service. * * * On the other hand, proprietors of private enterprises, such as places of amusement and resort, were under no such obligation, enjoying an absolute power to serve when they please. * * *
>
> "The common-law power of exclusion, noted above, continues until changed by legislative enactment."

The ruling therein announced was precisely adopted in the case of *Greenfeld v. Maryland Jockey Club*, 190 Md. 96, the Court of Appeals, stating at Page 102 of its opinion that:

> "The rule that, except in cases of common carriers, innkeepers and similar public callings, one may choose his customers is not archaic."

The Court of Appeals also carefully pointed out in the *Greenfeld* case that the rule of the common law is not

altered even in the case of a corporation licensed by the State of Maryland. The doctrine of the *Madden* and *Greenfeld* cases, *supra*, announced as existing under the common law, has been held valid, even where the discrimination was because of race or color. See *Williams v. Howard Johnson Restaurant*, 268 F. 2d 845 (restaurant) (CCA 4th); *Slack v. Atlantic White Tower Systems, Inc.*, No. 11073 U.S.D.C. for the District of Maryland, Thomsen, J. (restaurant); *Hackley v. Art Builders, Inc., et al.* (U.S.D.C. for the District of Maryland, D.R. January 16, 1960 (real estate development)).

The right of an owner of property arbitrarily to restrict its use to invitees of his selection is the established law of Maryland. Changes in the rule of law conferring that right are for the legislative and not the judicial branch of government.

The question next arises as to whether or not the State has proved its case under the criminal information on which it elected to proceed. It is a fundamental of our law that the burden rests upon the State to establish guilt beyond a reasonable doubt and to a moral certainty, and this requirement extends to every element of the crime charged. Basically, therefore, consideration must be given to a determination of two questions: (1) Has the State proved beyond a reasonable doubt that the Defendants were acting in a disorderly manner to the disturbance of the public peace? (3) If the answer to the first question is in the affirmative, has the State proved beyond a reasonable doubt that such actions occurred at a place of public resort or amusement?

As to the first question — an able discussion of whether a refusal to comply with directions given by a police officer could be held to be disorderly conduct appears in the case of *People v. Arko*, 199 N.Y.S. 402, in which it was said at page 405:

> "At times even a mere refusal to comply with the directions of a policeman, who may act in an arbitrary and unjustifiable way, does not constitute 'disorderly

> conduct'. Mere disobedience of an officer is not always an offense punishable by law, any more than his command is not always the law. There must be, upon the whole case, something more than a mere whimsical or capricious judgment on the part of the public authorities. * * * The case must present proof of some definite and unmistakable misbehavior, which might stir if allowed to go unchecked, the public to anger or invite dispute, or bring about a condition of unrest and create a disturbance."

In the case of *People v. Nixon*, 161 N.E. 463 (N.Y.), it was said at page 466:

> "Police officers are guardians of the public order. Their duty is not merely to arrest offenders, but to protect persons from threatened wrong and to prevent disorder. In the performance of their duties they may give reasonable directions."

In the case of *People v. Galpern*, 181 N.E. 572 (N.Y.), it was said at page 572:

> "Failure, even though conscientious, to obey directions of a police officer, not exceeding his authority, may interfere with the public order and lead to a breach of the peace."

And, at page 574, went on to say:

> "A refusal to obey (a police order to leave) can be justified only where the circumstances show conclusively that the police officer's direction was purely arbitrary and not calculated in any way to promote the public order."

The facts and circumstances hereinbefore stated offer clear and convincing proof that public disorder reasonably could be expected to follow if the five persons remained in the Park. The order of the police to leave, therefore, was not arbitrary. The refusal of the Defendants to leave upon request of the police, under the circumstances described

in the evidence, constituted acting in a disorderly manner to the disturbance of the public peace.

We pass then to the second question: Did such action occur at a place of public resort or amusement? This involves a determination of the legislative meaning of the expression "place of public resort or amusement". If the legislative intent was that the words were intended to apply only to publicly owned places of resort or amusement, then, manifestly, the testimony would not support a conviction here. By the same token, if the expression was intended to apply only to places in which all members of the public without exception were authorized or permitted to congregate, again there would be no evidence to support conviction here. On the other hand, if the reasonable intent and purpose of the quoted phrase was to prohibit disorderly conduct in a place where some segment of the public habitually gathers and congregates, the evidence would clearly justify a conviction.

The first suggested interpretation of the words must be rejected, because of the fact that the same statute uses the term "public worship", and this fact utterly destroys a contention that the word "public" has a connotation of public ownership because of our constitutional separation of church and state.

The second suggested interpretation is equally invalid, because its effect, in the light of the rule of law announced in the *Greenfeld* case, *supra*, would be the precise equivalent of the first suggested interpretation of the phrase. Moreover, such an interpretation necessarily would mean that the police authorities would be powerless to prevent disorder or bring an end to conditions of unrest and potential disturbance where large numbers of the public may be in congregation. To suggest such an interpretation is to refute it.

In the opinion of this Court the statute has clear application to any privately owned place, where crowds of persons other than the owner of the premises habitually gather and congregate, and where, in the interest of public safety,

police authorities lawfully may exercise their function of preventing disorder. See *Askew v. Parker*, 312 P. 2d 342 (California). See also *State v. Lanouette*, 216 N.W. 870 (South Dakota).

It is the conclusion of the Court that the Defendants are guilty of the misdemeanor charged.

W. ALBERT MENCHINE,
Judge.

Towson, Maryland

May 6, 1960

APPENDIX D

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment I of the United States Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment XIV of the United States Constitution:

> "SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

* * * * * *

"SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Section 123 of Article 27 of the Annotated Code of Maryland (1957 edition):

"Every person who shall be found drunk, or acting in a disorderly manner to the disturbance of the public peace, upon any public street or highway, in any city, town or county in this State, or at any place of public worship or public resort or amusement in any city, town or county of this State, or in any store during business hours, or in any elevator, lobby or corridor of any office building or apartment house having more than three separate dwelling units in any city, town or county of this State, shall be deemed guilty of a misdemeanor; and, upon conviction thereof, shall be subject to a fine of not more than fifty dollars, or be confined in jail for a period of not more than sixty days or be both fined and imprisoned in the discretion of the court; . . ."

Title II of the Federal Civil Rights Act of 1964, 78 Stat. 241:

"SECTION 201. (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

"(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

"(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building

which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

"(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

"(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

"(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

"(c) The operations of an establishment affect commerce within the meaning of this title if (1) it is one of the establishments described in paragraph (1) of subsection (b); (2) in the case of an establishment described in paragraph (2) of subsection (b), it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b), it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b), it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, trans-

portation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

"(d) Discrimination or segregation by an establishment is supported by State action within the meaning of this title if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof.

"(e) The provisions of this title shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b).

"SEC. 202. All persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.

"SEC. 203. No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 201 or 202, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 201 or 202, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202."